

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, ADMINISTRATOR,  
ET AL

VS

C. A. NO. 04 -312L

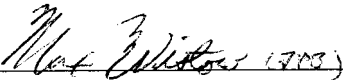
JEFFREY DERDERIAN, ET AL

**GRAY PLAINTIFFS'<sup>1</sup> MOTION TO STRIKE AFFIRMATIVE DEFENSE  
OF DEFENDANT SUPERSTAR SERVICES, LLC**

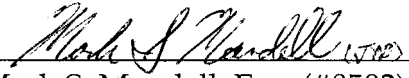
Now come the Plaintiffs in the Gray case and move, pursuant to Fed. R. Civ. P. 12(f), to strike the affirmative defense pertaining to service of process asserted by Defendant Superstar Services, LLC in its answer to Plaintiffs' First Amended Master Complaint. Specifically, Plaintiffs move to strike Defendant Superstar's sixth defense which asserts "insufficiency of service of process."

The reasons for Plaintiffs' motion are set forth in Plaintiffs' Memorandum of Law which is filed herewith.

*Plaintiff 13(d); 13(e); 17-63 inclusive;  
133-190 inclusive; 225-233 inclusive;  
and 240  
By their Attorney:*

  
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<sup>1</sup> All Plaintiffs in Gray, et al. v. Derderian, et al., C.A. No. 04-312L, by their separate counsel as indicated on the signature lines below.

413

Plaintiff 1-12 inclusive; 13(a)(b)(c);  
14-16 inclusive; 80-132 inclusive;  
222; and 223

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#### **CERTIFICATION**

I hereby certify that an exact copy of the within document was electronically mailed to the following individuals on this 5th day of April, 2005.

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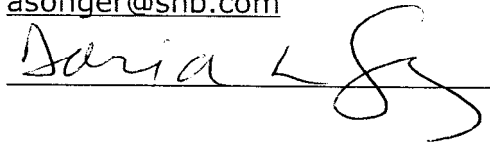
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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, ADMINISTRATOR,  
ET AL

VS

C. A. NO. 04-312 L

JEFFREY DERDERIAN, ET AL

**GRAY PLAINTIFFS'<sup>1</sup> MEMORANDUM OF LAW IN SUPPORT OF  
THEIR MOTION TO STRIKE AFFIRMATIVE DEFENSE  
OF DEFENDANT SUPERSTAR SERVICES, LLC**

**I. Factual Background**

Plaintiff Albert Gray, Administrator, et al. ("Plaintiffs") have filed the instant motion to strike the affirmative defense of insufficiency of service of process interposed by Defendant Superstar Services, LLC ("Superstar" or "Defendant"). On November 23, 2004, Plaintiffs moved to amend their initial Master Complaint. The court granted the motion on December 16, 2004. Plaintiffs thereupon filed and served the First Amended Master Complaint which revised the original allegations and added several new parties, both plaintiff and defendant. One of the new parties was Defendant Superstar.

Plaintiffs served Superstar by sending a copy of the complaint and summons by certified mail, return receipt requested, to Defendant's agent for service, Corporation Services Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware. (See copy of summons at Exhibit A). Defendant attempted to answer the case on February 4,

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<sup>1</sup> All Plaintiffs in Gray, et al. v. Derderian, et al., C.A. No. 04-312L, by their separate counsel as indicated on the signature lines below.

2005, but failed to serve all Plaintiffs' counsel with a copy of the complaint as required by Fed. R. Civ. P. 5. Two of Plaintiffs' attorneys of record were inexplicably omitted from the service list and did not receive copies of the answer. On March 16, counsel for Defendant mailed a copy of the answer to the attorneys whom Defendant had previously failed to serve. (See copy of Answer with certification at Exhibit B).

Defendant's answer denied liability to Plaintiffs and also asserted twenty one affirmative defenses. The subject of this motion is Defendant's sixth defense which reads, in its entirety, "And further answering, the defendant says that there was insufficient service of process pursuant to RCP 12(b) (5)." Plaintiffs now move, pursuant to Fed. R. Civ. P. 12(f), to strike the defense as insufficient. Plaintiffs represent that service was proper and there is no meaningful basis for asserting this defense. The purpose of this motion is to either strike the defense or divine its basis so that good service can timely be effected, if necessary. Counsel for Defendant Superstar has refused to voluntarily strike the defense, notwithstanding the apparently good return of service.

## **II. Argument**

Federal Rule 12 (f) reads as follows:

**"Motion to Strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

Despite a historic hesitance to grant motions to strike, courts regard such motions as the basic tools for eliminating legally insufficient defenses at an early stage of the proceedings. The grant of a meritorious motion may save time and effort that would otherwise be wasted in litigating matters that have no bearing on the case.

Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corporation, 418 F. Supp 798,801 (D.R.I., 1992).

In this case, Plaintiffs served Superstar by mailing a copy of the summons and complaint by certified mail, return receipt requested, to the registered agent designated by Superstar in Delaware, the state in which Superstar had been incorporated. The records of the Delaware Division of Corporations list Superstar's agent as Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware. The signed green return receipt attached hereto as Exhibit C is proof of delivery.

Fed. R. Civ. P. 4 governs the acceptable methods for service of process. Rule 4(h) somewhat circuitously mandates the manner in which corporations may be served. This subdivision of the Rule reads in pertinent part as follows:

“(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation... shall be effected:  
(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1),... “

A review of Rule 4e, in turn, directs the reader to the applicable state procedural rules.

Fed. R. Civ. P. 4(e)(1) states:

“Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and

filed, other than an infant or incompetent person, may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of the general jurisdiction of the State;..."

An examination of the Rhode Island Rules of Civil Procedure leads to Super. R.

Civ. P. 4. Service of process on out of state corporations is the subject of Super. R. Civ.

P. 4 (b)(2) which reads in pertinent part as follows:

“(f) Service Outside State Within the United States; Personal Jurisdiction.

When an individual or foreign corporation is subject to the jurisdiction of the courts of the state, service of process may be made outside the state as follows:

(2) Upon a foreign corporation by delivering of a copy of the summons and complaint by any interested person to the president, secretary or treasurer of such corporation or **to any agent or attorney for service of process designated by the corporation in the state of incorporation or by mailing a copy of the summons and complaint to any such officer or agent or to the corporation at its business address designated in the state of incorporation by registered or certified mail, return receipt requested**, or by any other method ordered by the court to give such corporation notice of the action and sufficient time to prepare any defense thereto.” (emphasis added)

Plaintiffs’ mailing a copy of the summons and amended complaint by certified mail, return receipt requested, to the agent for service designated by the corporate defendant in the state of incorporation conforms to the dictates of the applicable procedural rules. The signed receipt of service is clearly proof of delivery. Service of process was properly effected. The defense of insufficiency of service is unwarranted.

### III. The Motion to Strike

The time for moving to strike a pleading is clearly set forth in Fed. R. Civ. P. 12(f) :



“Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted under these rules, upon motion made by a party within twenty (20) days after the service of the pleading upon the party or upon the court’s own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.”

It is anticipated that the timeliness of this motion may be questioned in that many of Plaintiffs’ counsel received copies of defendants’ answer at the beginning of February. Fed. R. Civ. P. 5(a), however, requires that copies of pleadings be served upon each party. Service of defendant’s answer was not complete until March 16 at the earliest when defendant finally provided all counsel with a copy of its answer. This motion, then, is clearly timely in view of the late service of Defendant’s answer.

Courts have broad discretion in deciding motions to strike. Mastrocchio v. Unnamed Supervisor Special Invest Unit, 152 F.R.D. 439, 440-441 (D.R.I. 1993). Because the defense of insufficiency of service of process can be asserted by the defendant at any time in the proceedings, it is imperative that the sufficiency of the defense be determined by the Court before the statute of limitations expires. The Plaintiffs will be clearly prejudiced if the defense is upheld after the statute has expired. Any disfavor with which such motions might be viewed must be balanced with the Plaintiffs’ need to obtain a determination of the validity of the service of process before it is too late to correct any defects.

Plaintiffs submit that service is proper, the motion to strike is timely and, for the reasons previously set forth herein, the motion to strike Defendant’s sixth affirmative defense should be granted.

Plaintiff 13(d); 13(e); 17-63 inclusive;  
133-190 inclusive; 225-233 inclusive;  
and 240

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### **CERTIFICATION**

I hereby certify that an exact copy of the within document was electronically mailed to the following individuals on this 5<sup>th</sup> day of April, 2005.

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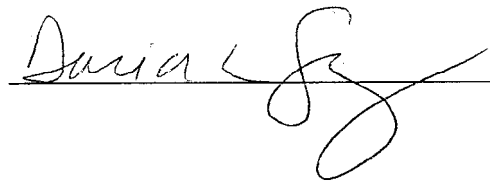
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A handwritten signature in black ink, appearing to read "David L. Songer", is written over a horizontal line.

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OF COUNSEL:  
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December 23, 2004

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Corporation Services Company  
A.F.S. Superstar Services, LLC  
2711 Centerville Road, Suite 400  
Wilmington, DE 19808

Re: Albert L. Gray, administrator, et al  
Vs: Jeffrey Derderian, et al

Dear Sir/Madam:

Enclosed is a copy of the summons and complaint which is hereby served upon you in accordance with Rule 4h(1) of the Federal Rules of Civil Procedure.

You will note that you are required to serve an answer to this complaint within twenty (20) days from the day it is served. However, if your attorneys require additional time, you may have them contact this office.

Very truly yours,

Charles N. Redihan, Jr.

CNR:SH  
Enclosure

e-mail: credihan@kprlaw.com

**U.S. Postal Service**  
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UNITED STATES DISTRICT COURT

FOR THE

District of

RHODE ISLAND

ALBERT L. GRAY, ADMINISTRATOR, ET AL

SUMMONS IN A CIVIL CASE

V.

JEFFREY DERDERIAN, ET AL

CASE NUMBER: 04 312L

TO: (Name and address of Defendant)

A.F.S.

Corporation Services Company  
Superstar Services, LLC  
2711 Centerville Road, Suite 400  
Wilmington, Delaware 19808

**YOU ARE HEREBY SUMMONED** and required to serve on PLAINTIFF'S ATTORNEY (name and address)

Please refer to the names and addresses of Station Fire Plaintiffs' Steering Committee attached hereto as Exhibit A who represent the respective plaintiffs listed in Exhibit A attached hereto and in the complaint which is served herewith.

The answer referred to below must be served on the plaintiffs' attorney identified for the respective plaintiffs listed in Exhibit A attached hereto and in the complaint.

an answer to the complaint which is served on you with this summons, within twenty (20) days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

CLERK

(By) DEPUTY CLERK

DATE

12/23/04

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF RHODE ISLAND

COPY

\* \* \* \* \*

\*

ALBERT L. GRAY, Administrator,\*  
ET AL,\*  
Plaintiffs,\*

\*

vs.

\*

CIVIL ACTION

\*

No. 04-312-L

JEFFREY DERDERIAN, ET AL,\*  
Defendants.\*

\*

\*

\* \* \* \* \*

ANSWER AND JURY CLAIM OF THE DEFENDANT, SUPERSTAR  
SERVICES LLC, TO THE PLAINTIFFS' FIRST AMENDED MASTER COMPLAINT

The defendant, Superstar Services LLC, in the above-captioned matter, hereby make this its answer to the plaintiffs' first amended master complaint.

FIRST DEFENSE

PARTIES

Plaintiffs

1-240. The defendant is presently without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 240 and call upon the plaintiffs to prove the same.

241-270. No responses are required to paragraphs 241 through 270.

GENERAL ALLEGATIONS AS TO ALL DEFENDANTS

271. The defendant is presently without knowledge or information sufficient to form a belief as to the truth of the



allegations contained in paragraph 271 and calls upon the plaintiffs to prove the same.

ALLEGATIONS AGAINST OTHER NAMED DEFENDANTS  
AND COUNT I THROUGH COUNT LXXVI

272-685. Paragraphs 272 through 685 are not directed to this defendant and therefore does not require a response; however, in the event that these paragraphs are read to be applicable to this defendant, the defendant denies the allegations contained therein.

COUNT LXXVII

686. The defendant incorporates herein by reference their answers to paragraphs 1 through 271 and 680 through 685 and make them its answer to paragraph 686 of Count LXXVII.

687. The defendant denies the allegations contained in paragraph 687 of Count LXXVII.

WHEREFORE, the defendants demand that the plaintiffs' complaint against them be dismissed and that judgment enter for the defendants, together with their costs.

SUPERSTAR SERVICES LLC

688. The defendant admits the allegations contained in paragraph 688 of Count LXXVII.

689. The defendant denies the allegations contained in paragraph 689.

690. The defendant denies the allegations contained in paragraph 690.

691. The defendant denies the allegations contained in paragraph 691.

WHEREFORE, the defendant demands that the plaintiffs' complaint against it be dismissed and that judgment enter for the defendant, together with its costs.

COUNT LXXVIII

692. The defendant incorporates herein by reference its answers to paragraphs 1 through 271 and 688 through 691 and make them its answer to paragraph 692 of Count LXXVIII.

693. The defendant denies the allegations contained in paragraph 693 of Count LXXVIII.

WHEREFORE, the defendant demands that the plaintiffs' complaint against it be dismissed and that judgment enter for the defendant, together with its costs.

COUNT LXXIX

694. The defendant incorporates herein by reference its answers to paragraphs 1 through 271 and 688 through 691 and make them its answer to paragraph 694 of Count LXXIX.

695. The defendant denies the allegations contained in paragraph 695 of Count LXXIX.

WHEREFORE, the defendant demands that the plaintiffs' complaint against it be dismissed and that judgment enter for the defendant, together with its costs.

COUNT LXXX THROUGH COUNT LXXXI

Paragraphs 696 through 706 of Counts LXXX through LXXXI are not directed to this defendant and therefore does not require a response; however, in the event that these Counts are read to be applicable to this defendant, the defendant denies the allegations contained therein.

SECOND DEFENSE

And further answering, the defendant says that the acts complained of were not committed by a person and/or entity for whose conduct the defendant was legally responsible.

THIRD DEFENSE

And further answering, the defendant says that the plaintiffs were not in the exercise of due care, but rather the negligence of the plaintiffs contributed to or caused the injury

or damage complained of, wherefore, the recovery of the plaintiffs is barred in whole or is subject to diminution under the comparative negligence law of the State of Rhode Island.

#### FOURTH DEFENSE

And further answering, the defendant says that the cause of action is barred by reason of the Statute of Limitations.

#### FIFTH DEFENSE

And further answering, the defendant says that the court does not have personal jurisdiction over the defendant, wherefore, the defendant requests that this action be dismissed pursuant to R.C.P. 12(b)(2).

#### SIXTH DEFENSE

And further answering, the defendant says that there was insufficient service of process pursuant to R.C.P. 12(b)(5).

#### SEVENTH DEFENSE

And further answering, the defendant says that the complaint should be dismissed pursuant to R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

#### EIGHTH DEFENSE

And further answering, the defendant says that the complaint should be dismissed pursuant to R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted, insofar as the plaintiffs have failed to give notice of any claim and/or unsafe condition as required by law, and the defendant was thereby prejudiced, wherefore the plaintiffs are barred from recovery.

#### NINTH DEFENSE

And further answering, the defendant states that they had no duty at law or common law to the plaintiffs and/or plaintiffs' decedents, wherefore the plaintiffs are barred from recovery.

#### TENTH DEFENSE

And further answering, the defendant says that to the extent

that it had any obligations to the plaintiffs and/or plaintiffs' decedents, such obligations have been fully, completely and properly performed in every respect.

#### ELEVENTH DEFENSE

The defendant states that there was no negligence, gross negligence, willful, wanton, or malicious misconduct, reckless indifference or reckless disregard of the rights of the plaintiffs and/or plaintiffs' decedents, or malice (actual, legal or otherwise) on the part of the defendant as to the plaintiffs and/or plaintiffs' decedents herein.

#### TWELFTH DEFENSE

And further answering, the defendant says that if the plaintiffs prove that the defendant was involved in any of the transactions alleged in the plaintiffs' complaint, the defendant acted in good faith at all times with respect to those transactions, and the plaintiffs are therefore barred from recovery.

#### THIRTEENTH DEFENSE

And further answering, the defendant says that if the plaintiffs and/or plaintiffs' decedents were injured or damaged as alleged, the plaintiffs and/or plaintiffs' decedents assumed the risk of such injuries or damage.

#### FOURTEENTH DEFENSE

And further answering, the defendant says that they are not liable to the extent that the plaintiffs' losses were a result of an unforeseeable intervening and/or superceding civil or criminal act or acts.

#### FIFTEENTH DEFENSE

And further answering, the defendant says that if the plaintiffs and/or plaintiffs' decedents sustained injuries and/or damages as alleged in the complaint, such injuries and/or damages were caused by the intervening and superseding acts of third persons, which acts the defendant did not and reasonably could not foresee and/or are remote.

#### SIXTEENTH DEFENSE

And further answering, the defendant says that in the event that the named plaintiffs are determined not to have standing to bring this action, defendant asserts such lack of standing as an affirmative defense.

#### SEVENTEENTH DEFENSE

And further answering, the defendant says that in the event that this defendant is determined to be a joint tortfeasor, defendant asserts that they are entitled to an allocation of relative degree of fault among all joint-tortfeasors so that the pro-rata share of each defendant can be determined in accordance with the Rhode Island Uniform Contribution Among Tortfeasors Act, R.I.G.L. § 10-6-1, et seq.

#### EIGHTEENTH DEFENSE

And further answering, the defendant says that the plaintiffs have failed to join a party or parties necessary for the just adjudication of this matter and have further omitted to state any reason for such failure.

#### NINETEENTH DEFENSE

And further answering the defendant says that the plaintiffs' claims are barred by estoppel or waiver.

#### TWENTIETH DEFENSE

And further answering, the defendant says that the plaintiffs are guilty of laches in bringing this action and are therefore barred from recovery.

#### TWENTY FIRST DEFENSE

And further answering, the defendant says that the plaintiffs' and/or plaintiff decedents' employer or employers were negligent with respect to the matters set forth in the First Amended Master Complaint, that such negligence caused in whole or in part the damages claimed to have been sustained as set forth in the First Amended Master Complaint and that the plaintiffs or plaintiff decedents claiming such damages received workmen's compensation benefits from his or her employer or employers.

Therefore, even if the plaintiffs are entitled to recover against the defendant, which the defendant specifically denies, they are not entitled to recover in the amount set forth in the First Amended Master Complaint because the defendant is entitled to set off any and all the aforesaid workmen's compensation payments against any judgment which might be rendered in the plaintiffs' favor.

TWENTY SECOND DEFENSE

The defendant incorporates by reference any and all affirmative defenses asserted by any other defendant not specifically set forth in its Answer and affirmative defenses.

JURY CLAIM

THE DEFENDANTS HEREBY MAKE CLAIM FOR A TRIAL BY JURY.

SUPERSTAR SERVICES, LLC.

By its attorney,



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Date: \_\_\_\_\_

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CERTIFICATE OF SERVICE

I, T. Dos Urbanski, hereby certify that on this day, I forwarded notice of the foregoing document(s) by mailing a copy thereof, postage prepaid to the following:

Max H. Wistow, Esq.  
John P. Barylick, Esq.  
WISTOW & BARYLICK, INC.  
61 Weybosset Street  
Providence, RI 02903

  
\_\_\_\_\_  
T. Dos Urbanski

Date: \_\_\_\_\_



**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to

Corp Services Co  
AFS Superstar Services  
2711 Centerville Rd, Suite 400  
Wilmington, DE 19808

2. Article Number  
(Transfer from service label)

PS Form 3811 August 2001

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature

X *Laura M. Cooper*

☐ Agent

☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes  
If YES, enter delivery address below: ☒ No

3. Service Type

☒ Certified Mail

☐ Express Mail

☐ Registered

☐ Return Receipt for Merchandise

☐ Insured Mail

☐ C.O.D.

4. Restricted Delivery? (Extra Fee)

☐ Yes

7099 3400 0007 3028 1632

Domestic Return Receipt

102595-02-M-1540